UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al.,	:	Civil Action No.:
	:	1:23-cv-108
Plaintiffs,	:	
versus	:	Friday, March 31, 2023
	:	
GOOGLE LLC,	:	
	:	
Defendant.	:	

The above-entitled hearing was heard before the Honorable John F. Anderson, United States Magistrate Judge. This proceeding commenced at 10:35 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: United States of America, et al. versus Google LLC, Civil Action Number 23-cv-108.

MR. MENE: Good morning, Your Honor. May it please the Court. Gerard Mene with the U.S. Attorney's Office. Your Honor, Julia Wood and Mike Wolin from the Department of Antitrust Division are here as well. Julia Wood will argue for the Government.

THE COURT: Thank you. Good morning.

MS. WOOD: Good morning, Your Honor.

THE COURT: Thank you.

MR. HENRY: Good morning, Your Honor. Tyler Henry from the Office of the Attorney General of Virginia on behalf of the plaintiff states.

THE COURT: Thank you.

MR. WOLIN: And good morning, Your Honor. Michael Wolin for the United States.

THE COURT: Good morning.

MR. MAHR: Good morning, Your Honor. Eric Mahr, Freshfields Bruckhaus Deringer, on behalf of Google. I'm here with our local counsel, Craig Reilly, and my colleagues, Andrew Ewalt and Tyler Garrett. Mr. Ewalt will be handling the argument today.

THE COURT: Well, before we get to the argument, to the extent that it's necessary, I just want to ask a few

questions about the status of certain things. I also want to just make sure that you are clear that in any proceedings that we have in open court, unless you warn me and I agree, it is of the public record, and anyone who orders the transcripts or whatever is going to be entitled to get the transcripts. So if at any point in time you think you're going to be treading on ground that you don't want disclosed immediately, we have people who have made orders for transcripts on expedited bases and things like that, you need to let me know. Okay.

MS. WOOD: Understood.

THE COURT: And we'll address that. Okay.

What is the status of the protective order and the ESI order?

MS. WOOD: Your Honor, we are very, very close to a protective order. I think we have perhaps one final issue we need to try to think through, which we were just talking about in the hall before we came in. But we're hopeful that we could file that shortly.

THE COURT: Is that both the protective order and the ESI protocol?

MS. WOOD: The ESI protocol, we've been exchanging drafts. I think that might follow by a few days behind the protective order, but it is also very close.

THE COURT: Okay. The expert stipulation that

there was a reference to in the joint discovery plan, what is that, and just give me a heads-up as to what that is and when you may be anticipating getting that to the Court.

MS. WOOD: We also want to get that to the Court very soon in the next week or so. That is a stipulation --

THE COURT: You're on spring break next week, if I remember that right. It sounds like you have others that are going to be helping you do this?

MS. WOOD: That is correct, Your Honor. That is correct, Your Honor. I suspect I'll probably be working a few of those hours, but maybe somewhere warmer.

But we -- the expert stipulation is an agreement among the parties as to how to treat materials relied upon by the expert, what, in terms of disclosures, are exchanged, materials that back up the expert reports. Things like that.

THE COURT: Okay. All right. There was some other issues in the discovery plan relating to experts, and I just didn't know how that may or may not impact --

MS. WOOD: And that would impact, Your Honor. I think your guidance on the dispute that we've teed up vis-a-vis the experts in the discovery plan will be helpful to resolving the final issues on the expert stip.

THE COURT: Well, it may not be, but --

MS. WOOD: Or it may not.

THE COURT: -- we'll get to that point at some point this morning.

MS. WOOD: Okay.

THE COURT: You know, I've reviewed the joint discovery plan that was submitted and the submissions that I got yesterday afternoon from both sides. Obviously Google's submission was a little bit more expansive in dealing with each and every issue that there was some argument with the parties.

MS. WOOD: Yes, Your Honor. I had assumed that -- for things other than legal briefing, that we would address those disputes in court. If Your Honor would prefer that we brief those in advance, I'll be mindful of that going forward. I just -- the only reason that we briefed that one issue is because it was a legal issue with case law that we thought Your Honor might benefit from. The other things we intend to rely primarily on argument here today. But we'd be happy to submit additional papers if that would be helpful to the Court.

THE COURT: Well, at this point I think I'm going to be prepared to go ahead and rule on most of these without any further argument or discussion, and then once we get through the joint discovery plan, I want to take a few minutes and just talk about some housekeeping and procedural issues as well.

MS. WOOD: All right.

THE COURT: So if you have it in front of you, we can follow it page by page, and I will tell you what my rulings are going to be and the rationale behind some of those rulings. I am going to need to have some further discussion on at least one of the issues when we get to it.

But looking at the joint discovery -- the plan in paragraph 5B relating to the time period in doing the substantial completion of -- the production of the documents that were done in the pre-complaint investigation, I am going to modify that date, but it's going to be 14 days -- it's going to be 21 days after the entry of the protective order. You know, I am hearing that the protective order -- and, again, I haven't seen it -- has a time period to providing notice to the parties and those kinds of things. So I think 21 days is probably more reasonable than 14 if you have to give notice, and then it takes time to give people notice and those kind of things. So I think the 21-day time period.

I don't want to make it -- if I made it 14, there may be some delay in getting the protective order to me to start doing that. So I don't want to disincentivize the parties in getting the protective order to me sooner rather than later. So for that paragraph, it's going to be that the earlier of 21 days after the entry of the protective

order, or May 5, 2023.

MS. WOOD: And, Your Honor, just to clarify, the protective order that both sides have agreed to as of now, I believe, would provide for two-days' notice to give the third parties notice of the protective order, and then 10 days. So 12 days of the 21 will be spent waiting on the third party. That would leave us 9 days to complete the production. And we will do our absolute best endeavor to get that done. If we have any problems with that, we'll come back to the Court, Your Honor.

THE COURT: All right. You know, at this point, everything will be produced unless you get an objection.

MS. WOOD: Absolutely, Your Honor.

THE COURT: Okay. That should be the process going forward.

You know, and I -- I think the issue in 6(A) obviously is a very significant one that the parties have briefed fully for me, and I've reviewed everything that you've submitted there.

You know, I think the plaintiffs' position is the more persuasive one, to be honest with you. I think requiring -- any discovery request to require the plaintiff in this case to go to every agency within the custody or control of the executive branch is overbroad. I just -- I don't see practically how that could be done, to be honest

with you. I think limiting it to the agencies -- as they describe it, the Federal Agency Advertisers, is an appropriate way to deal with the situation given the limited time period that the parties are going to have.

I will tell you, though, that this is not going to be a revolving door. And, I don't know, this reference to, you know, if we lose on a damages issue, we're going to try and supplement it and have somebody else come in and do things, I mean, these are the eight, six or eight, or however you want to count them. This is not going to be you can bring somebody in, and then you're not going to oppose them to do discovery as to anybody new. You're not going to have enough time to do that. You're going to have to deal with, you know, the ones that you have set out here today.

If, for one reason or another, one or two of them fall by the wayside, they fall by the wayside, and you go with the remaining ones. So, you know, they're the ones that you decided to pursue, the ones you've named, you've represented that they're the ones you're seeking damages on, so I'm going to adopt the plaintiffs' position as to 6(A) on the limitations of discovery.

6(C). Again, while I think, in theory, that may have some -- Google's position may make sense in theory, I think, as a practical matter, I can't limit them. I mean, it is -- if you think they're going overbroad, if you think

they're asking for way too much, then you object and discuss it. But having a bar for only asking for the same custodians that were done before and only refreshing certain documents I think is too restrictive under the circumstances of the case, so I'm not going to be including, in paragraph C, 6(C) when I issue my Rule 16 scheduling order.

The same with F. Again, you know, I think the parties are going to be limited in the number of depositions that they can take, and so hopefully they will use them judiciously. But, you know, having a complete bar as to an individual who is deposed in his or her capacity during a pre-complaint investigation, you know, isn't going to be appropriate, so I'm not going to include paragraph F.

On G, the number of depositions. You know, I think Google's position on both of these, the (i) and (ii), are probably the appropriate way to -- there are going to be a lot of non-party fact witnesses. Maybe not for the Government, but certainly for Google. And I understand that, and I don't want to tie your hands too tight behind your back. I think 20 is a lot, obviously. Your vague reference to you may need more than that, we'll have to see, but, you know, don't count on it. So when you start counting 20, get your best 20 in there, because there may not be any more after that.

So I do think 20 -- I think 10, obviously, for

party fact witnesses really should be enough. Again, all of this is, you know, subject to me reconsidering upon a real showing of good cause, showing how you've used the limits judiciously and why you would really need to do any more than that. But, for G, I'm adopting Google's position as to (i) for 10 depositions of party fact witnesses and 20 depositions of non-party fact witnesses.

Going down further in G having to do with the current and former employees of any executive branch agency of the United States or only current and former employees of the Federal Agency Advertisers. Again, I think, given that I have allowed up to 20 non-party fact witnesses and my concern that that could be abused, to be honest with you, by the defendant in this case by just launching tons of discovery that then would be the obligation of the plaintiff to then distribute to any and all federal agencies, I think it's just probably too hard to deal with. So I'm going to deal with -- I'm going to adopt plaintiffs' position. As to the current and former employees, the Federal Agency Advertisers will be the party witnesses for the purposes of this paragraph going forward. So you'll have that there.

I'm going to get -- I'm going to hold off on 8, and we're going to deal with that one at the end because that's the one I really need to have some substantial discussion with the parties about.

Turning then to 13 -- if you skip 8, and I think paragraph 13 is the only other one that I need to deal with here.

And, again, this one -- I think the plaintiffs' position here -- and, again, this kind of relates a little bit more to what I was talking about earlier about potential for abuse -- that requiring the plaintiff to accept service as to any executive branch agency really could be difficult to deal with. So I am going to adopt the plaintiffs' position as to 13, that service on any agency of the United States that is not a Federal Agency Advertiser must be effected by service in accordance with the applicable state and federal law.

If you start running into problems -- and I know sometimes serving the federal agencies can be difficult -- you can come back and we can talk about expediting that procedure or other things there. But I think under the circumstances, that's what I'm going to do in the joint discovery -- or in my Rule 16 order dealing with the joint discovery plan.

Now, let's talk about paragraph 18, and the evidentiary cutoff date. You know, as I have tried to look through and see what the various differences are in what you have proposed, and then stepping back and trying to figure out what is the problem that you all are trying to address

and whether this does or doesn't do it and whether it is or isn't necessary is what I'm still struggling with, to some part.

It appears that the parties can't agree on the initial part of this paragraph and that Google has non-public documents, and the plaintiff talks about information created or produced as opposed to data or information produced by any party. That's what I see there. It looks like you all have agreed on subparagraphs C, D and -- C, D, E and F, but the remaining ones were not able to be agreed to.

Let me just hear briefly, first from you, Ms. Wood, and then from you, Mr. Ewalt, about what is the issue that you're trying to deal with, and why is it that the Court needs to address that now.

MS. WOOD: I appreciate that, Your Honor.

The issue we're trying to deal with is to find a mutually-agreed time horizon on which the trial of this case will be presented. The changes in the tech industry and, in particular, the ad tech industry happen at a rapid speed. And, because of that, there could be -- in theory, the defense could continually update the information including and up to the trial itself. And so we want to make sure that --

THE COURT: Isn't there an obligation to

supplement your discovery responses, though?

MS. WOOD: Often, the discovery responses are -- by agreement of the parties, the time horizon is as of the date from whatever the start date is until the date of filing of the complaint. That is a very standard practice in many civil cases.

In this case, we have agreed to extend it to the end of fact discovery instead. That was also the order that was entered by the district court in the Google *Search* case. Because to allow it to continue through trial puts a necessary -- it's an asymmetrical data advantage that Google has. As it's running the business, it is continually adopting and adapting its behavior. And so you can have a deposition that locks in testimony on a particular subject matter, or documents on a particular subject matter, and then three days before the trial, something changes and the witnesses or the documents can be produced that are brand new and provide new information. There is a very practical problem with respect to the expert report exchange here as well.

THE COURT: Well, help me understand. You know, you're going to be trying this case at some point, probably.

MS. WOOD: Yes, Your Honor.

THE COURT: And, at that point, you will be looking at historical information.

MS. WOOD: Yes, Your Honor.

THE COURT: And whether they did something up until last week, just because they're not doing it today, doesn't mean it isn't wrong; right?

MS. WOOD: Correct, Your Honor.

THE COURT: So why -- I mean, I'm just trying to figure out how that really impacts your ability.

MS. WOOD: Because if they are able to continually produce new documents and new information about new practices that, in their view, change the landscape or the legal theories that the Government has provided, that's not information we were ever able to obtain. It evades the fact discovery cutoff all together.

And, again, the parties are in agreement about this principle. There are only two areas principally where we disagree. They want -- they want to agree to that rule vis-a-vis documents, data and information having evidentiary cutoff at the close of fact discovery, but they want their experts to be able to rely on documents we've never seen when they oppose our experts. We have 17 days to respond.

THE COURT: Their expert has to rely on documents they've never seen because they're going to be looking at and analyzing your expert reports that they won't see until after the fact discovery period ends.

MS. WOOD: And that's why the document -- and

you'll see B in our position, a specific carveout to this are the expert reports, including any analysis contained therein and supporting materials provided in connection therewith. So that is carved out.

THE COURT: It says: "Provided, however, that the expert witnesses may not rely on documents, data or information that was not otherwise produced before the close of fact discovery."

MS. WOOD: Right. So what I'm saying is, the experts have a universe of factual information upon which they can rely to support their expert opinion. That universe is delineated and contained as of the fact discovery cutoff. What they would like is for that -- and so with that information, they may do analysis --

THE COURT: That's assuming that the parties asked for everything. And, again, I mean, you only have an obligation to produce what was asked for in discovery absent your expert report, who then has to give his or her -- the basis for his or her opinions.

MS. WOOD: Well, I believe you'll find that both sides have requested documents and information that the other side intends to rely on, and that would apply to their experts as well. So if their expert is going to rely on material that they haven't yet produced, that is one of our document requests, and they should produce that before the

end of fact discovery so that we're not seeing it for the first time when we have 17 days to respond to their expert report.

It also, to allow an expert exception, would allow the case to continue to have new -- the entire purpose of a fact discovery cutoff and to have a universe of agreed factual information from which the trial proceeds would be eviscerated if we were unable to have some finite period of time that both experts have to rely on.

So if we have material that our experts are going to rely on, our expert reports aren't due until whenever they're due on the schedule, October, but we're going to have to produce that by September, because if our experts are going to rely on it, they're entitled to see it.

But I think the same should be for them, because they have an asymmetric data advantage because they are the ones running the ad exchange, they are the ones running the ad server. They have log-level data. They have a tremendous data advantage that we can't overcome. We can't say, oh, they made this argument in their opposition report, let's look at the data that would rebut that, because we don't have access to that data. We're stuck with what we got during discovery. And, otherwise, we would need to seek additional discovery of the material that they produce in response to the expert reports, and that, again, is counter

to the whole point of having a fact discovery cutoff.

Similarly, with respect to the commercially-available information point that is in our --

THE COURT: Subparagraph F.

MS. WOOD: Yes. Thank you, Your Honor.

Our only point there is, first of all, the term is ambiguous. To the extent it means subscriptions to industry information that we don't have, sometimes it's behind a paywall, sometimes governments are not even entitled to access that, it may be available only to participants in the industry. Again, we would be handicapped because we wouldn't be able to get that same information for ourselves to respond to their complaint.

So the entire purpose of this provision is to make sure we're on a level playing field, both sides produce what they intend to rely on at trial, both sides produce what they intend their experts to rely on. And, yes, you can do different things -- when they see our expert report and the type of analysis that our expert does, they can figure out how they want to do it, but they still have to do it within the same evidentiary pot of information. They're not entitled to cherry-pick and bring new things in that we don't have access to and we don't have the time or the ability to rebut.

THE COURT: Well, why doesn't their subparagraph B

address that appropriately? "Documents or data (including documents or data relied upon by an expert witness in his or her report) produced by any party pursuant to the disclosure obligations set forth in the scheduling order relating to expert discovery or in any other agreement or order."

MS. WOOD: I can tell you, Your Honor, that as I understand -- if by B they mean to suggest that their experts are not going to rely on material that was not produced in fact discovery, then I agree, that takes care of it. In our meet-and-confer, we've had multiple sessions about this. That is not my understanding of their position, but they can clarify that.

But if by B they mean they do not intend for their experts to rely on material outside the fact discovery cutoff, then I think our only agreement is about commercially-available data.

The one other thing I should add just for completeness, but I think this could be, you know, taken up at a different date, is there may come a time, if there is a liability finding here, that the Court would need to consider appropriate equitable remedies.

We acknowledge that the scope of material that might need to be reviewed for equitable remedy purposes might need to reflect more current data. And so we're not taking the position that they're precluded forever from

producing new material in that regard. That was really honestly more for their benefit and for the Court's benefit. We didn't want the Court -- we wanted the Court to understand that we were sympathetic -- would be sympathetic to that concern.

If they don't want that provision, I think we can deal with that when and if that occurs, but I think we are most concerned that experts not be allowed to rely on material outside the fact discovery cutoff.

THE COURT: Okay.

MS. WOOD: Thank you, Your Honor.

THE COURT: Mr. Ewalt, let me have you address -- and I think it's a valid concern. I mean, you know, in our typical cases, the discovery cutoff date is both for fact and expert discovery, so we don't have to deal with this issue very often. But the idea that fact discovery sets the parameters upon which this case will end up being tried has some appeal to me. I mean, there has to be an end to it at some point. And, you know, if fact discovery has been set -- we've set a date for when all the fact discovery needs to be done. Obviously if there's a motion to compel, and something has to be done after that, that will, you know, have to get swept into that. But, you know, giving someone the unfettered ability to continue to go out and gather new facts and to do further fact-finding efforts or

whatever after the discovery cutoff date seems to be difficult to deal with.

So help me understand why it is that you think something that has been outlined by Ms. Wood wouldn't be appropriate.

MR. EWALT: Thank you, Your Honor.

So fact discovery is incredibly important, as is expert discovery in an antitrust case, and we will not have any information about the precise opinions and the ways that the Government is supporting those opinions about how --

THE COURT: Well, sure you will. You're going to get all the -- as Ms. Wood has indicated, you're going to get all the facts upon which their expert is going to rely by the end of fact discovery.

MR. EWALT: Yes, Your Honor.

THE COURT: You've got smart people, you've got smart experts. You know, they're as smart, probably, as the plaintiffs' experts, as knowledgeable on these issues. You know, they'll know what their experts are going to say; aren't they?

MR. EWALT: Well, we hope they're smart, Your Honor, but they're not clairvoyant. And, as you acknowledged, the plaintiffs are going to have top-shelf experts. We expect they're going to be creative. The Government's entire theory of liability in this case,

frankly, is extremely creative, unprecedented in many ways. So we can't foresee until we see what's in those expert reports that the Government puts out in October exactly how they're going to try and prove some of these novel theories.

So we need -- we, for sure, will be complying with all of the discovery, and we'll live up to our obligations there to provide things by the fact discovery deadline, but we need to have the ability -- if there is an unforeseen development from the plaintiffs' expert reports, we need to have the ability to put on a defense to that, to make sure that we can use additional documents or additional data if necessary to fully defend ourselves from these theories that we will not have any information about until October, a month after the fact discovery cutoff.

If I may --

THE COURT: Well, help me understand how that's going to come up. I mean -- and I have not studied the document -- or the discovery that you all attached to some of the pleadings that I got yesterday, but it appears expansive. It would be somewhat surprising that there would be any significant data that would be out there that wouldn't have already been produced. You know, massaging the data or running a different report, but having the basic data there seems to be not an issue because it's only what your expert is going to be doing with the data that has

already been produced.

MR. EWALT: So there is a tremendous amount of data. In fact, this entire industry is data-driven. And some of that data has been requested, and some will be produced. Frankly, you know, so much has been requested that it's just not possible to produce every piece of data that's been requested. But there will be a very large set of data that is provided before the close of fact discovery in this case, but what we don't know is how it's going to be analyzed. From this massive amount of data, what are the facts that the plaintiffs' experts are going to pull out of it, and what significance are they going to draw from those facts?

Once we know that, once we see that in their reports, we can understand whether those inferences are appropriate, whether the analysis is appropriate, or whether there's some additional facts that need to be provided to put that into context to really understand the full picture.

THE COURT: Where are you going to get those additional facts? That's the part I'm trying to understand. You're not going to be able to do third-party discovery because fact discovery is over. So it's only facts that you have that would be something that you could then go out and try and, you know, one, that wasn't produced in discovery, so it wouldn't have been responsive to a discovery request

that had been sent because, as you well know in our court, if you have been served with a discovery request and you don't provide that information in response to a discovery request, your ability to use that information at trial -- for possibly other than impeachment purposes -- is almost non-existent. I don't want to say impossible, but it would be very difficult for you to try and do.

So, I mean, what you're saying is that you would only then be able and go out and find new facts after you get their expert report, that is facts that were not produced in discovery, to have your expert deal with and provide some response in an expert report. And I'm just trying to figure out what kind of a fact would it be that you wouldn't have produced in your responses to their discovery request?

MR. EWALT: Well, Your Honor, it's a great question, and I understand you don't have a crystal ball either here.

And so this is one point I wanted to make is that this provision, paragraph 8 or Section 8 of the proposed discovery plan here is one that I haven't seen in my career before. I haven't seen, at the very outset of a case, this kind of cutoff. It's my understanding this is very -- this is not typical in this Court's experience either.

The one example that we've seen of this is the

Search case that the Government gave us. And if Your Honor compares the language that we've proposed in paragraph 8 to what the language is that Judge Mehta ordered in the *Search* case, you'll see that it's very, very close, if not verbatim, in almost all respects. Certainly all material respects.

And I would say that the Government raised these same arguments before Judge Mehta. They were argued there, they were briefed there. The Government tried the same playbook there, and Judge Mehta rejected it. He entered the order that he did, and that's the language that we've proposed in paragraph 8.

THE COURT: Well --

MS. WOOD: Your Honor, may I respond to that?

THE COURT: Well, I mean, I -- I'm looking, and you're talking about the order amending scheduling and case management? I'm not as comfortable with the statement that everything that you have put in your paragraph 8 suggestions is what was done in the D.C. court.

I mean, it said: At trial, you shall not rely upon data or documents created after so-and-so or that came in your possession after so-and-so unless they were produced in response to one of plaintiffs' discovery requests produced pursuant to a court order or otherwise agreed to or for impeachment purposes.

MR. EWALT: It's paragraph 3, Your Honor, of Judge Mehta's order.

THE COURT: Paragraph 3?

MR. EWALT: Yes, Your Honor.

MS. WOOD: Your Honor, if I may assist. There are two separate orders that issued from the *Search* case.

THE COURT: Maybe I'm looking at the --

MS. WOOD: I think you're looking at the amended scheduling and case management order.

THE COURT: Right. Yeah.

MS. WOOD: And then -- that was from February of 2021. In May of 2022, there was an order regarding production deadline, motion to compel deadline and evidentiary cutoff.

And, again, the procedure or posture there was different. Fact discovery had already closed. Expert discovery had already begun. And Judge Mehta chose an evidentiary cutoff that was in the middle of expert discovery. It was before the close of fact discovery, but it was after fact discovery when the issue was brought to Judge Mehta's attention, which is different than the position that we're in now.

MR. EWALT: And with respect, Your Honor, the position the Government is taking out here is even more extreme. At the very beginning of the case before we've

seen any of this developed, you know, to say that we're going to cut off what our experts can do at such an early stage is more extreme than what was done in the *Search* case. It is a different procedural posture, but that cuts in our favor.

THE COURT: Well, your expert is not going to be able to rely on information that was requested in discovery and not produced.

MR. EWALT: Understood, Your Honor.

THE COURT: And that goes for both sides, you know, for the plaintiff and the defendant.

So, you know, that's where I'm looking at it in a very broad-based view of, you know, that's the rule and why is there -- everybody arguing about, you know, what's going to happen here, what's going to happen there.

But, you know, I mean, I -- to be honest with you, coming in, I was inclined to just say we're not going to have a paragraph 8 at this time. You know, I appreciate the parties trying to work things out at this point, but, you know, I think the golden rule is if you're going to use it, you've got to produce it in discovery. And, you know, that's going to apply in this case. And, you know, if it's factual information and the party asks for it and it wasn't produced, it's not going to be evidence in the case if the party tries to come in and use it.

So I think, at this point, I'm going to not adopt either side's paragraph 8. I think if -- I'll let you continue to have some discussions. If you can focus the issues a little bit more and want to raise this more as a one-off issue to be maybe more fulsome briefing and really oral argument on the issue, then I'll consider it. But I'm going to enter a Rule 16 scheduling order that adopts your joint discovery plan in part. It will outline which -- Google's, plaintiffs', whatever, positions as to certain things, but it's not going to include -- I'm not adopting either one of the party's suggested positions for paragraph 8 on the evidentiary cutoff.

Again, if you want to continue to have those discussions, since you are sort of in agreement in some ways, but, you know, the overarching rule is factual information requested in discovery has to be produced. You know, it's not -- as you've already, both sides, complained about a little bit, not a whole lot of time between fact discovery and expert discovery either, so there shouldn't be a whole lot of new facts that get generated or anything like that in theory. So take that as some sort of guidance, and if you want to continue to have some discussions, we can do that.

All right. So I think that takes care of the --

MS. WOOD: Your Honor, may I ask one point of

clarification?

THE COURT: Sure.

MS. WOOD: So if you look at our position 8(B).

THE COURT: Okay.

MS. WOOD: Just for purposes of clarity, that would be what we would intend to provide or outline in the expert stipulation that we're trying to get to, Your Honor. And I think it might be helpful to the parties if you could tell us if that 8(B) would be appropriate in the context of our expert stipulation, consistent with what Your Honor just said.

MR. EWALT: And, Your Honor, I'm not sure it is consistent with what Your Honor just said. I heard Your Honor talk about an obligation to produce documents that were requested --

THE COURT: Right.

MR. EWALT: -- and that if documents are not requested -- or, excuse me. I took Your Honor's statement to mean that if a document was requested and not produced, it would not be usable by the experts usable at trial.

THE COURT: Right.

MR. EWALT: What this statement 8(B) doesn't cover is documents that were not requested.

THE COURT: Right.

MS. WOOD: But if we request all documents that

your experts intend to rely upon -- which I believe we have, but if we haven't, we certainly will -- then that would cover it.

In other words, I don't want to play a game where, oh, you forget to word it the right way. Or, as Mr. Ewalt just correctly said, we're going to have -- we've requested very broad data. If they say that's too voluminous, I can't get you that broad data and we agree, okay, we'll take some subset, and then their expert relies on material beyond the subset we agreed to, I don't think that should be used against us to say that was never requested.

THE COURT: Well, I'm not ruling on any discovery requests now. But if there is a discovery request about producing all documents on which your expert relies and they respond to that and they don't produce documents -- they produce new documents that the expert's relying on facts, then we'll deal with that issue as to whether that can be done or not.

MS. WOOD: Thank you, Your Honor.

THE COURT: And, again, you know, this typically comes up in the context of reviewing both fact and expert discovery at the same time, but you convinced me that we should bifurcate, so we need to figure out, you know, the appropriate way to do that. But, you know, we'll defer on that issue at this point. But, you know, the theory is that

if it's asked for, not produced, it can't be used. Okay.

Let me just take a couple of minutes and run through some housekeeping or procedural things and just make sure we're all on the same page going forward.

I will be getting out today a Rule 16 scheduling order. It will sort of be a little bit more complicated than some of mine, in that it will address adopting this paragraph, this paragraph, whatever.

You know, I really want you to have everyone who's working on this case -- and I don't know that it grows by the day with people making notices of appearances left and right. It's really important that everybody who's working on this case have it and read it. You know, I know there will be a lot of people doing different things and all that kind of stuff, but, you know, it's not going to take that long for somebody to read it, make sure they understand it and know what we are expecting in this case.

When I say "everybody," I don't just mean the lawyers, I mean your support staff, too, to be honest with you. I think it's as significant that they have the opportunity to look at it and understand when they file things, what -- that isn't necessarily the end of it. Things have to be done to follow on to that.

Let me just go over a few things and make sure that we're all understanding this. There is, and I enforce,

the good-faith consultation requirement. And that really means a good-faith attempt to resolve issues. And, in the past, I've run into issues about people not being responsive or, you know, six different people dealing with six different issues and those kinds of things like that. I hope I don't have to do this in this case, but, if necessary, I will appoint -- have you designate a person who is the one person of contact for each side. You all can talk about whether you want to do that or not. But, you know, it can't be I'll get back to you in a couple weeks. It's, you know, okay, thank you, I need to talk to my client, or I need to deal with -- you need to be responsive with that. It can't be sending an email at, you know, 1 p.m. and filing a motion at 5 when you didn't get a response.

But, again, the counter to that is, you can't let it go on forever either. At some point you've got to bring a motion. And don't get yourself in a situation where everybody is kicking the can down the road and then it gets too late. So you have to try -- you have to certify that in your pleadings that you've done that.

I will -- on occasion I get motions to compel and other motions that don't have that on a Friday afternoon. On a Monday, I'll enter an order, you know, denying it without prejudice, saying it hasn't met the requirements of

the local rules. So make sure you check that box, okay, that it's a substantive check and not just an off-the-hand check.

You will see, and it probably has been shared in other cases, that we will -- I will be having what we call an expedited briefing schedule for motions that I will be hearing. Again, this is my schedule, not Judge Brinkema's schedule. Judge Brinkema will be deciding dispositive issues which require the full briefing of the 14/6 or whatever you agree to on those kinds of timetables.

The expedited briefing schedule that's set out in the scheduling order is an option; it's not a requirement. I suggest that in some instances it is very appropriate, you know, three or four interrogatories, four or five document requests, you know, do we take this deposition, not take that deposition, those kinds of things.

If it is a very complicated matter or one involving a lot of different issues, it is in your interest and my interest to not necessarily do this on what I would call the expedited schedule. Just to let you know, what that means is, the expedited schedule that you can file something by 5:00 on Friday. And that isn't an aspiration, that's a rule, it's 5:00 on Friday. The oppositions are then due on 5:00 Wednesday. And the replies can be filed on Thursday as quickly as you can get them.

You know, if you're going to choose to do an expedited briefing schedule, you need to prepare -- be prepared to, you know, get the opposition. And if you want to file a reply, you know, get it, analyze it and prepare a reply in time for me to get it and read it. As you saw today, you know, I'm not just waiting around for people to give me stuff on Thursday afternoon to deal with you as my only motion on Friday. We have a number of different cases, and this is not my only case. So take that into consideration. But if you're going to, you know, take advantage of that, be prepared to take advantage of it. And I typically will have the arguments and will hopefully rule from the bench in doing all those kinds of motions.

And that is kind of a complicated schedule. If you want to do it two weeks out, everybody gets a little bit more time. If you do it three weeks out, it will be outlined in there. It's a little bit more complicated, but it will give you the sense as to what that is. But, again, the point is, you don't have to use it, be judicious when you use it, make sure you understand what the issues are.

There is a requirement that a copy of anything that gets filed electronically needs to be delivered to my chambers or delivered to the courthouse for me. Paper copy. So if it gets filed on Friday, I need it on Monday; if it gets filed on Wednesday, I need it on Thursday. If you're

filing your reply brief, it makes a lot of sense for you to try to get it to me on Thursday since I'm going to be, you know, hearing a motion on Friday morning at 10:00. So think about that.

Motions to seal. Again, we mentioned earlier about everything in the public record is going to be open to the public. We have a fairly cumbersome process in our Local Civil Rule 5 for parties filing things under seal. I suspect, at some point in this case, there will be the need for a party to want to file something under seal. I would encourage you that if you think there's going to be a lot of information that you want to file under seal, that you designate somebody to deal with those issues. Okay.

I have found in the larger cases that things go more smoothly if you have a person who is the motion-to-seal person, and he or she knows what the process is and can get it done quickly and appropriately under the circumstances. Again, I'm not trying to run your case for you; I'm just giving you the experience of what I've seen in big cases and how it helps things go more smoothly.

Just to sort of remind you of what our local rule says, that if you're going to file something under seal, you file it electronically under seal. So it's not like you're delivering a paper copy to the Court with an envelope and, you know, to-be-filed-under-seal kind of thing, as in the

old days.

You file it electronically under seal. At the same time, you need to file a motion to file under seal, a memorandum in support of that motion to file the document under seal. And that memorandum, the local rule describes what it has to include in it. You have to include, you know, the rationale behind what it is that you want to file under seal, and it has to address the appropriate standard to be applied.

The Fourth Circuit has set out two different standards for filing material under seal. Discovery-related issues that are typically ones that I would hear, it's the common law standard where there has to be, you know, an interest that is strong enough to overcome the burden for public access.

The more stringent standard in filing any type of dispositive issues, whether it be a motion to dismiss or a motion for summary judgment, is the First Amendment standard where there has to be a compelling governmental interest. And you have to not only address that standard, but how -- what you are filing is narrowly tailored to that specific compelling governmental interest.

So you've got to file the motion, the memorandum, the proposed order, and then a separate notice of filing under seal. If you don't file it, you don't file a notice

of a hearing for motions to seal. You just file this notice of filing under seal. That is to give the public notice that you've now filed this request to have some information with restricted access.

You should be filing a redacted version. And, again, if this is, you know, a 20-page brief and you need to file certain sections and certain paragraphs, you need to redact that information and file the redacted version in the public record. So you have the redacted brief, the under seal brief, the notice, the motion, the memorandum and the proposed order.

The process that then gets followed, and the notice requires, that anybody will have seven days to file a response to the notice. So the document will remain under seal until further order of the Court. I typically calendar those, and after seven or eight days comes, I then will look at that and decide whether, you know, the motion to seal is appropriate or not and then enter the orders in chambers.

I will alert you to the fact that Judge Brinkema is very sensitive about information being filed under seal. Some of our district judges are more sensitive than others; she is one that pays a lot of attention to this. So I, in turn, pay a lot of attention to this in the cases that are in front of Judge Brinkema, because you don't want to and I don't want to be in the position of filing something or

allowing something to be filed under seal and then at some point later on she determines why was that. And typically, in some instances, you can meet the lesser standard, but you may not be able to meet the higher standard. So just because I may allow something to be filed under seal in a discovery motion, one, does not mean that she will allow it to be filed under seal or to remain under seal in a dispositive issue. And even if she does that, that at any time in trial that there would be any ability to keep that information restricted access. So that's a sensitive issue for the parties, but it needs to be, you know, followed and addressed.

If you are filing something under seal, there will be a document or an information. And you're doing that because the other side designated it as confidential. You know, you need to follow the same procedure, that as you file the complete version, the redacted version, a notice, a motion, a memorandum of proposed order.

The memorandum typically is pretty brief. It says I'm doing it because I have to under the terms of the protective order, you know, either I agree or I don't agree or I don't take a position on whether it should or shouldn't be filed under seal. You can -- if you disagree, you can put it in there, you know, you don't think it meets the appropriate standard, but you're doing it as required.

In those instances, the designating party, that is the party that marked it confidential or is requiring to file a motion, has to file something within the 7-day time period to support it. Again, having somebody who's paying attention to these issues is significant because there have been times where the eight days has run and somebody files a motion and said, you know, I don't care, I did it because they designated it and nobody came in to support it and I unsealed it. And sometimes they didn't care; sometimes they did care and forgot about it. So try and make sure everybody's paying attention to that.

You know, I will say, our clerk's office is very, very good about if a mistake is made. If you contact them, they will help you remedy that situation. And, you know, I will say, obviously when you're filing anything under seal, you want to make sure that, you know, someone who knows what they're doing is involved in the process. But there have been times where things inadvertently get filed in the public record that were intended to be filed under seal. If that happens, call the clerk's office. They will probably contact me and say is it okay if I just, you know, seal it right now, and then we'll deal with the paperwork later, and typically I allow that, and then we'll figure out what to do afterwards.

So, you know, it's -- you want to avoid that

having to happen, but it's not the end of the world if it happens. Just contact the clerk's office, and they will help you address that issue pretty quickly in that regard.

We have this Friday motions day, and so, you know, again, you know what the expedited schedule or current briefing schedule is. There are three Fridays between now and the end of the year that I know that I am not hearing motions. There may be others, but these are the ones that I already know, and so I just want to give you a heads-up on that so that you don't make plans or file motions and set it for these dates and then I have to move them.

I will not be hearing motions on April 21 or 28 or June 30th. So, you know, I'm hopeful that you will get all the -- you will be starting your process of discovery and not in a position to where you're going to need my time and attention until early May. But, you know, just keep that in mind. Probably the first time I will be able to hear any substantive motions and objections or other things relating to discovery that has now been served probably isn't going to be until, I guess it's May 4th, whatever that Friday is, the first Friday in May.

Okay. What other issues would be helpful for us to discuss while we're together today? Ms. Wood, anything?

MS. WOOD: No, Your Honor. I think -- I think that covers it for today. We may have some things that we

need to tee up, but they -- the parties will work out an agreement on that and --

THE COURT: Yeah.

MS. WOOD: -- get to you promptly.

THE COURT: Well, and I -- well, I don't want to get ahead of myself, but, you know, if issues get -- I just -- as some of you may know, the magistrate judges here in our court, there's a week a month that we are on criminal duty, and those are very busy times on the criminal side and allow very limited time on the civil side. I will just alert you that there may be a Friday that you notice something on that, if I'm the duty judge that Friday, that I may continue the hearing until Monday just because I may not be prepared to rule on Friday. I hope that isn't the case, you know, but don't be shocked if on a -- you notice something for a Friday and I reach out and say, you know, it's going to be tough for me to do it, but I'll try and do it the following Monday, you'd be -- prepare it over the weekend to be able to deal with it on Monday, but we'll see how it plays out. Okay.

MS. WOOD: Thank you, Your Honor.

THE COURT: Mr. Mahr, Mr. Ewalt, is there anything from --

MR. MAHR: Nothing further for Google. We'll try to get the protective order out to you today and the other

documents next week.

THE COURT: That's great. I will act upon them quickly. I will review them and then, if appropriate, act upon them quickly. So if you get it to me either later today or tomorrow -- or Monday, I'll get it entered certainly by Monday. Okay.

MS. WOOD: Thank you, Your Honor.

THE COURT: You all have a nice weekend.

(Proceedings adjourned at 11:34 a.m.)

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR